

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

LORENZO CARL PAYNES,

Plaintiff,

No. CIV S-04-1868 MCE KJM P

vs.

D.L. RUNNELS, et al.,

Defendants.

FINDINGS & RECOMMENDATIONS

Plaintiff is a state prison inmate proceeding pro se with a civil rights action under 42 U.S.C. § 1983. In general, he alleges that he is a pre-operative transsexual and that the defendants have failed to protect him and to provide appropriate housing for him. He also alleges that the defendants have colluded to hide staff misconduct.

Specifically, he alleges that on March 29, 2003, he was assaulted in his cell by another inmate. Defendant Tuffin was in charge of the controls to open and close the cell doors. Amended Complaint (Am. Compl.) ¶ 18. Plaintiff says he submitted a grievance about Tuffin's action on May 9, 2003, but withdrew it on May 25, 2003, after Lieutenant Myers offered to have him transferred if he did so. Id. ¶ 25. He then told M. McDonald, the chairman of the classification committee, that he had withdrawn his complaint against Tuffin because of the promise he would be transferred. Id. ¶ 27. Despite the fact that he withdrew his staff misconduct

1 complaint, he wrote to the Director of the California Department of Corrections and
2 Rehabilitation (CDCR) about the incident and received a letter from defendant Runnels' office in
3 response to his attempts to bring Tuffin's misconduct to the attention of CDCR officials. Id. ¶¶
4 30-34.

5 Plaintiff also recounts his attempts to be classified in a manner that would
6 facilitate his transfer from High Desert State Prison (HDSP) to California Mens' Colony, where
7 he was previously housed and where he feels safe. Id. ¶¶ 35, 37. He alleges he was told he
8 would be transferred after his misconduct complaint against defendant Tuffin was resolved, but
9 has instead been released from Administrative Segregation to general population, in derogation
10 of his safety. Id. ¶¶ 44, 46.

11 Defendants have filed a motion to dismiss the complaint, arguing that plaintiff has
12 failed to exhaust his administrative remedies and that the complaint fails to state a claim as to
13 defendants Runnels and Felker.

14 II. Failure To Exhaust

15 A. Exhaustion Standards Under The Prison Litigation Reform Act (PLRA)

16 The PLRA provides that "no action shall be brought with respect to prison
17 conditions under section 1983 of this title, . . . until such administrative remedies as are available
18 are exhausted." 42 U.S.C. § 1997e(a). "Conditions of confinement" subject to exhaustion have
19 been defined broadly as "the effects of actions by government officials on the lives of persons
20 confined in prisons." 18 U.S.C. § 3626(g)(2); Smith v. Zachary, 255 F.3d 446, 449 (7th Cir.
21 2001); see also Lawrence v. Goord, 304 F.3d 198, 200 (2d Cir. 2002). Proper exhaustion of
22 available remedies is mandatory. Booth v. Churner, 532 U.S. 731, 741 (2001); Woodford v.
23 Ngo, 548 U.S. 81, 126 S. Ct. 2378 (2006) (addressing timeliness aspect of proper exhaustion).
24 The grievance process must be completed before the inmate files suit; exhaustion during the
25 pendency of the litigation will not save an action from dismissal. McKinney v. Carey, 311 F.3d
26 1198, 1200 (9th Cir. 2002).

1 California prison regulations provide administrative procedures in the form of one
2 informal and three formal levels of review to address an inmate's claims. See 15 Cal. Code
3 Regs. §§ 3084.1-3084.7. An initial grievance must be filed within fifteen working days of the
4 challenged act or omission. 15 Cal. Code Regs. § 3084.6(c)(6). Administrative procedures
5 generally are exhausted once a plaintiff has received a "Director's Level Decision," or third level
6 review, with respect to his issues or claims. 15 Cal. Code Regs. § 3084.5.

7 Finally, to satisfy the exhaustion requirement, a grievance must alert prison
8 officials to the claims the plaintiff has included in the complaint. Porter v. Nussle, 534 U.S. 516,
9 524-25 (2002) (purpose of exhaustion requirement is to give officials "time and opportunity to
10 address complaints internally before allowing the initiation of a federal case"); Brown v. Sikes,
11 212 F.3d 1205, 1209 (11th Cir. 2000) (1997e(a) requires that a prisoner provide as much relevant
12 information as he reasonably can in the administrative grievance process).

13 A motion to dismiss for failure to exhaust administrative remedies prior to filing
14 suit arises under Rule 12(b) of the Federal Rules of Civil Procedure. Wyatt v. Terhune, 315 F.3d
15 1108, 1119 (9th Cir.), cert. denied sub nom. Alameida v. Wyatt, 540 U.S. 810 (2003). In
16 deciding a motion to dismiss for a failure to exhaust non-judicial remedies, the court may look
17 beyond the pleadings and decide disputed issues of fact. Id. at 1119-20. Defendants bear the
18 burden of proving plaintiff's failure to exhaust. Id. at 1119.

19 B. Analysis

20 Defendants have submitted the declarations of M. Dangler, Appeals Coordinator
21 at High Desert State Prison, where the challenged acts and omissions occurred, and N. Grannis,
22 the chief of the Inmate Appeals Branch. Dangler avers that he conducted a search of plaintiff's
23 appeals file and concluded that it contains no appeal exhausted through the second level between
24 March 29, 2003 and May 23, 2005 about an assault in plaintiff's cell, his concerns with his
25 placement at HDSP, or a conspiracy by staff members to cover up his complaint against
26 defendant Tuffin. Declaration of M. Dangler (Dangler Decl.) ¶ 13.

Grannis avers that the Inmate Appeals Branch (IAB) has not accepted a Director's Level appeal from plaintiff regarding an assault in his cell, the propriety of housing him at HDSP or a conspiracy to cover up the assault on him. Amended Declaration of N. Grannis (Am. Grannis Decl.) ¶ 12. She has provided a printout from IAB, showing those of plaintiff's grievances either adjudicated at the Director's Level or screened out for untimeliness, incompleteness or other reasons. Am. Grannis Decl., Ex. A. The printout shows that one medical grievance, 03-359, was adjudicated at the Director's Level in 2003. Id.

Plaintiff has provided copies of various grievances and officials' responses as exhibits to his complaint and to his opposition to the motion to dismiss.

1. Factual Background

On February 4, 2003, plaintiff filed a grievance or "602," Log No. 03-359, asserting he should not be housed at HDSP because there are no groups for transgender inmates, he has difficulty talking to the doctor about the hormones he is taking, and the regulations provide that transgender inmates may require special placement. Am. Compl., Ex. A at 27.¹ Plaintiff appealed the first level denial, adding that his "safety concerns are a factor as well as medical issues" and that he had been assaulted for refusing a demand for sex. Id., Ex. A at 31. On May 2, 2003, the appeal was denied at the second level:

Your request for a transfer has been reviewed; it has been determined that you do not meet the guidelines for a medical transfer. . . . [I]f you required a medical treatment that is not available at HDSP, then a transfer would be arranged A review of your health record indicates that you are receiving hormone therapy Additionally, you have been referred to Mental Health. This indicates that HDSP is able to provide treatment for your transgender condition, so a transfer is not indicated.

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¹ The court refers to the page numbers assigned by the CM/ECF system.

1 Inmate Paynes, in this appeal you stated that you have received
2 threats and sexual requests so you fear for your life. This appears
3 to be a custody issue. You need to talk to your Correctional
Counselor regarding a transfer to a facility that clusters transgender
inmates.

4 Based on this information, your appeal request for a medical
5 transfer to CMC-E is denied.

6 Am. Compl., Ex. A at 29-30.

7 In the portion of the 602 form for appealing to the Director's Level, plaintiff
8 wrote that he was dissatisfied with the Second Level response:

9 This appeal is more than a medical concern. I was attacked 4-8-03
10 on D-Yard at H.D.S.P. inmate came in my cell and asked me for
sex and then attacked me after I said no. I was then placed in Ad-
11 Seg for enemy concerns from 1D-3-204L and released to C yard.

12 Id., Ex. A at 28. At the bottom, the form contains the notation that the appeal was denied at the
13 Director's Level on August 6, 2003. Id. The denial reads, in pertinent part, "The Second Level
14 Review determined there was no medical necessity to transfer the appellant to the CMC as he
15 was receiving appropriate care for his transgender condition at HDSP." Opposition to Motion To
16 Dismiss (Opp'n), Ex. A at 12.

17 After the assault and plaintiff's placement in Administrative Segregation on April
18 18, 2003, plaintiff filed a grievance, assigned Log No. 03-1024, in which he complains the
19 assault was made possible because defendant Tuffin opened his cell door. Am. Compl., Ex. E at
20 39. On May 25, 2003, plaintiff agreed to withdraw this appeal. Id., Ex. E at 40. On the same
21 day, plaintiff signed a "Rights and Responsibility Form" in connection with the filing of a staff
22 complaint. Id., Ex. E at 42. However, on August 7, 2003, plaintiff wrote on the 602 form that he
23 was put in Ad Seg because of his complaint of staff misconduct, but questioned how there could
24 be an investigation if he had withdrawn his grievance. Id., Ex. E at 40; see also Am. Compl.,
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1 Ex. F at 1² (ad seg placement notice dated 7/28/03). A First Level response dated July 15, 2003
2 notes that plaintiff had withdrawn the appeal because “in talking with Officer Tuffin . . . you feel
3 that there was no malicious intent on his behalf.” Am. Compl., Ex. H at 5. In a memorandum to
4 defendant Tuffin, dated June 17, 2003, defendant Felker wrote:

5 The fact-finding review of the Staff Complaint, Appeal Log # C-
6 03-1024, submitted by Inmate Paynes, CDC # H-77477, has been
completed.

7 Based on the fact-finding review of this inmate appeal, it has been
8 determined that the allegations of staff misconduct resulted in no
findings. Inmate Payne [sic] has chosen to withdraw this appeal.
9 The results of this finding have been communicated to inmate
Payne.

10 Am. Compl., Ex. I at 7.

11 It appears plaintiff was released from Administrative Segregation some time after
12 the June 17th memorandum was issued, but was again placed in segregation on July 28, 2003
13 because he had “been identified as a witness to an investigation in which serious staff
14 misconduct has been alleged” and his placement was necessary “to preserve the integrity of this
15 investigation.” Am. Compl., Ex. E at 41. He apparently filed a grievance, but it was screened
16 out as untimely: the appeals screening form dated August 21, 2003 indicates that the fifteen day
17 limit for submitting a grievance had been exceeded: “114-D dated 7/28/03 and did not submit an
18 appeal until 8/19/03.” Am. Compl., Ex. U at 6.

19 Plaintiff prepared another grievance on September 23, 2003, for which no log
20 number is apparent, although a “received” stamp appears at the bottom of the page. This
21 grievance notes plaintiff had requested “appropriate housing” through the grievance system and
22 through letters to CDCR officials. He also mentioned the assault and attempted sexual assault.
23 He requests that the policy for housing transgender inmates be reviewed. Opp’n, Ex. G at 25-26.
24 On the same day, he submitted another grievance, which also does not bear a log number,

25 ² The complaint and its attachments were scanned in groups, so the page numbers for the
26 exhibits begin again with each group.

1 complaining that he dropped his staff complaint against defendant Tuffin on the understanding he
2 would be transferred, but he was then returned to segregation. See Opp'n., Ex. G at 27. An
3 Appeals Screening Form dated September 25, 2003 said the grievance was untimely because he
4 was placed in segregation on July 27, 2003. Opp'n, Ex. G at 24.

5 Plaintiff did not confine himself to the grievance system, but also wrote letters to
6 prison officials about a number of topics and filed a claim with the Victims' Compensation
7 Board. In a letter dated November 25, 2003, the Board notified plaintiff that his claim arising
8 from the assault would be rejected on December 19, 2003. Opp'n, Ex. D at 18.

9 In a letter dated November 25, 2003, defendant Runnels responded to a letter
10 plaintiff sent to the Director of Corrections. He observed that "HDSP is currently conducting an
11 Internal Affairs Investigation (IAI) into your allegations. That IAI, Log # I-HDSP-058-2003 is
12 due for completion on 12/ 21/ 03." Am. Compl., Ex. K at 11; see also id., Ex. L at 13. The
13 subject of the underlying staff complaint is not described.

14 On February 25, 2004, plaintiff filed the following grievance, assigned Log No.
15 04-516:

16 On 12-11-03 the above appellant appeared before H.D.S.P. I.C.C.
17 commite [sic] after being placed in Ad/Seg for staff misconduct.
18 The Appellant expressed that after being assaulted and attempted
19 sexual assault, that being housed at High Desert State Prison was
20 jeopardizing his safety. I.C.C. stated after the completion of the
21 investigation of staff misconduct the appellant would be
22 transferred, on the contrary after the completion the Appellant was
23 placed back in general population at H.D.S.P. on 12-11-03. Staff
24 official at H.D.S.P. are egnoring [sic] the need to house the
25 Appellant with appropriate housing after a correctional officer
26 open the Appellant's cell door which allowed the Appellant to be
assaulted. The Appellant is a transgender inmate . . . that has
expressed on numerous occasions that he had received sexual
demands being housed at H.D.S.P.

After being released from segregation, the appellant had received threats from two different cell mates on the day of his release from segregation. Prison officials at High Desert State Prison are not in compliance with C.D.C. S Title 15 Calif. Admin. Code section 3375.2(a)(19)(23) and the U.S. Constitution. . . .

Am. Compl., Ex. N at 17, 21. Plaintiff received a Second Level response on April 15, 2004. Id., Ex. N at 19-20. At the bottom right hand corner of the 602 form, there is a stamp, “Received April 26, 2004 Inmate Appeals Branch.” Another stamp, below the first, reads “Exceeded 15 Day Time Limit.” A hand written notation reads: “Appeal Rejected by 3rd Level Memo Dated 6/7/04.” Id., Ex. N at 17. The June 2004 memo says that Log No. 04-516 was being returned to plaintiff because it was not submitted “within 15 working days of the event or decision being appealed, or of receiving a lower level decision.” Id., Ex. R at 32; Grannis Am. Decl., Ex. A at 7.

2. Exhaustion With Respect to Specific Claims

a. Conspiracy To Cover Up Staff Misconduct

None of plaintiff’s grievances addressed this segment of the complaint; defendants’ motion as to this ground is well taken.

b. The Assault

Plaintiff filed a number of grievances complaining about the assault and about the propriety of housing him at HDSP. Most were screened out, at one level or another, as untimely. See, e.g., Opp’n, Ex. G at 24, 25, 27; Am. Compl., Ex. N at 17, 21 & Ex. R at 32. Plaintiff did, however, file a timely grievance, Log No. 03-1024, in which he described the assault and named defendant Tuffin as the officer responsible for opening his cell door. See Am. Compl., Ex. E at 39. Plaintiff never received a Director’s Level adjudication of this grievance because he withdrew it on May 25, 2003. Id., Ex. E at 40. In his amended complaint, submitted under penalty of perjury, plaintiff avers he withdrew the grievance only because Lieutenant Myers, who interviewed him in connection with the grievance, said “that if the plaintiff withdraw he’s [sic] staff complaint against Officer Tuffin he would have him transferred. The plaintiff withdrew on

1 5.25.03.” Am. Compl. ¶ 25. Defendants have not presented any evidence to rebut plaintiff’s
2 claim.

3 Several courts have held that officials’ actions may render a prison grievance
4 system unavailable for exhaustion purposes. In Kaba v. Stepp, 458 F.3d 678, 682-83 (7th Cir.
5 2006), the inmate alleged he did not pursue the Bureau of Prisons’ grievance procedure because
6 he had not been given the necessary grievance forms and because he had been threatened by a
7 particular prison guard. The court recognized that

8 when the prisoner causes the unavailability of the grievance
9 process by simply not filing a grievance in a timely manner, the
10 process is not unavailable but rather forfeited. On the other hand,
11 when prison officials prevent inmates from using the
12 administrative process . . . , the process that exists on paper
13 becomes unavailable in reality.

14 Id. at 684. The Court of Appeals remanded the case to the district court to resolve the factual
15 disputes created by the inmate’s and the prison’s evidence on the availability of the grievance
16 procedure.

17 In Hemphill v. New York, 380 F.3d 680, 686 (2d Cir. 2004), the Court of Appeals
18 recognized that “in some circumstances, the behavior of the defendants may render
19 administrative remedies unavailable. To the extent that the plaintiff lacked ‘available’ remedies
20 the PLRA’s exhaustion requirement is inapplicable.” In that case, plaintiff alleged that guards
21 threatened him in order to dissuade him from filing a grievance about earlier mistreatment. Id. at
22 684. The court continued:

23 The test for deciding whether the ordinary grievance procedures
24 were available must be an objective one: that is, would a “similarly
25 situated individual of ordinary firmness” have deemed them
26 available.

27 Id. at 688. It remanded the case to the district court for a determination “whether some
28 seemingly available remedies were rendered unavailable by the threats Hemphill received”
29 Id.; see also Miller v. Tanner, 196 F.3d 1190, 1194 (11th Cir. 1999) (grievance procedure not

1 available when inmate was told he did not have the right to appeal an adverse decision); Miller v.
 2 Norris, 247 F.3d 736 (8th Cir. 2001) (grievance process not available when officials refused to
 3 provide grievance forms); Brown v. Croak, 312 F.3d 109, 111-12 (3d Cir. 2002) (grievance
 4 process not available when prisoner was told to wait until conclusion of investigation and then
 5 was not informed when it was completed).

6 In this case, plaintiff has alleged he withdrew this grievance only because
 7 Lieutenant Myers promised to have him transferred if he did so. Already concerned about his
 8 safety, plaintiff was offered a quid pro quo: drop the grievance/staff complaint in order to secure
 9 a safer placement. Practically speaking, this offer took the grievance outside the established
 10 procedures and rendered the grievance process unavailable.

11 This conclusion is bolstered by plaintiff's actions after he was returned to
 12 segregation instead of being transferred. First, he attempted to revive grievance 03-1024 by
 13 seeking a second level review on August 7, 2003. Am. Compl., Ex. E at 40. Second, he filed
 14 additional grievances on September 23, 2003, complaining about the assault and about the
 15 propriety of housing him at HDSP; in one, he specifically complained that he dropped his earlier
 16 grievance because of the promised transfer. Opp'n, Ex. G at 24, 25, 27; Am. Compl., Ex. N at
 17 17, 21. These grievances were rejected as untimely. Under these circumstances, then,
 18 administrative remedies were rendered unavailable for plaintiff's claim against defendant Tuffin.

19 3. Inappropriate Housing At HDSP

20 N. Grannis avers that the Inmate Appeals Branch has not accepted an appeal from
 21 plaintiff alleging that, because he is transgendered, he was inappropriately housed at HDSP.
 22 Grannis Am. Decl. ¶ 12. The printout of plaintiff's appeals shows that only one appeal
 23 concerning living conditions was accepted at HDSP, but that was from 2005 and was cancelled.
 24 Grannis Am. Decl., Ex. A. In addition, three others about living conditions at HDSP from 2004
 25 and 2005 were screened out.

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1 Plaintiff suggests he exhausted administrative remedies on this claim through his
2 pursuit of several grievances, many of which were screened out for “frivolous reasons” as he
3 describes them. The court finds that plaintiff pursued this issue in grievance 04-516 and that
4 when it was improperly screened out at the Director’s Level, remedies were no longer available
5 to him.

6 The grievance assigned Log No. 04-516 addresses plaintiff’s dissatisfaction with
7 the ICC’s decision to retain him at HDSP and again addresses the propriety of housing him at
8 HDSP. Am. Compl., Ex. N at 17. This grievance was signed on February 25, 2004 and
9 challenges the ICC’s decision of December 11, 2003. Even though the grievance was not timely
10 under the applicable regulations, plaintiff received a Second Level response.³ 15 Cal. Code
11 Regs. § 3084.6(f). The appeal was screened out as untimely at the Director’s Level. This
12 determination of untimeliness is puzzling: if the Second Level response was issued on April 15
13 and if the Inmate Appeals Branch received the appeal on April 26, then the appeal was submitted
14 within fifteen working days of the immediately preceding decision. It appears, thus, that the IAB
15 considered the initial, underlying grievance untimely and thus refused to address the appeal from
16 the Second Level decision.

17 Nothing in the regulations, however, suggests that this was an appropriate
18 resolution: defendants have pointed to nothing that allows a reviewer at the Director’s Level to
19 make a retroactive finding that the grievance was untimely at some lower level and thus reject an
20 otherwise timely appeal from a Second Level review. The language of section 3084.6 (c)
21 suggests otherwise: “An appellant must submit the appeal within 15 working days of the event or
22 decision being appealed, or of receiving an unacceptable lower level appeal decision.”

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24 ³ The informal and first levels were bypassed. See 15 Cal. Code Regs. § 3085.3(c).
25 Additionally, the regulations give an appeals coordinator the ability to reject a grievance for
26 untimeliness, but do not require rejection, indicating a coordinator may exercise discretion in
determining whether to accept a late grievance. 15 Cal. Code Regs. § 3084.3(c) (“An appeal may
be rejected for the following reasons. . .” (emphasis added)).

Moreover, the second level resolution included the following language: "The inmate is advised that this issue may be submitted for a Director's Level of Review if desired." Am. Compl., Ex. N at 20. When the appeal was thereafter rejected at the Director's Level, there do not appear to have been other available remedies for plaintiff to pursue.

On this record, the court finds that defendants have not borne their burden of proving plaintiff's failure to exhaust available remedies.

III. Other Matters

On March 17, 2008, plaintiff was granted thirty days in which to return the documents necessary to effect service on defendant Woodford. The thirty day period has expired and plaintiff has not complied. The action should be dismissed as to defendant Woodford for lack of prosecution.

IT IS HEREBY RECOMMENDED that:

1. The action be dismissed as to defendant Woodford because of plaintiff's failure to prosecute. Fed. R. Civ. P. 41(b); and

2. The motion to dismiss (docket no. 43) be denied as to the claim that defendant Tuffin opened plaintiff's cell door, leading to an assault and as to the claim defendants Runnels and Felker failed to provide appropriate housing for him, but granted as to the claim that the defendants conspired to cover-up staff misconduct.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections

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1 shall be served and filed within ten days after service of the objections. The parties are advised
2 that failure to file objections within the specified time may waive the right to appeal the District
3 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

4 DATED: August 29, 2008.

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7 U.S. MAGISTRATE JUDGE
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